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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-310

DENNIS NIX,
Petitioner,

VS.

DONALD SWEENEY, ETC.,
Respondent.

BRIEF OF RESPONDENTS

In Opposition to Petition for Writ of Certiorari

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INDEX

Page

Statement of the Case 1

Issue 3

Argument:

Whether the Mandate of the United States Court of Appeals for the Eighth Circuit remanding this case for new trial required a new trial on all theories of liability originally advanced by Plaintiff-Petitioner, or, whether the Court of Appeals order was limited by the issues raised and preserved on appeal of Petitioner.. 4

Conclusion 7

CITATIONS

Cases

Gasoline Products Co., Inc. v. Champlin Refining Co., 283 U.S. 494, 51 S.Ct. 513, 75 L.Ed. 1188 (1933) 5

Pet Milk Co. v. Boland, 185 F.2d 298 (8th Cir. 1950)... 4

Supreme Court Rules

Rule 59(a) Federal Rules of Civil Procedure 5

Rule 28(a)(5) Rules of Appellate Procedure 5

Rule 19, Supreme Court Rules 4

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STATEMENT OF THE CASE

Suit was filed by Petitioner against three individual Defendants, including Respondent, and the Village of Breckenridge Hills. Petitioner alleged a violation of rights guaranteed under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution of the United States. Petitioner specifically alleged he had been unlawfully arrested by Respondent and that Respondent had unlawfully seized certain records and other documents belonging to Petitioner. Prior to trial, Petitioner dis-

missed his complaint as to all individual defendants except Respondent, and the District Court entered Summary Judgment on behalf of the Village of Breckenridge Hills relying on Missouri's Doctrine of Sovereign Immunity. The District Court also entered Summary Judgment in favor of Respondent on the issue of his alleged unlawful arrest. The case was tried before a jury on the allegation of unlawful search and seizure. The jury returned a verdict for Respondent. Thereafter, Petitioner filed a Motion for a New Trial. Following a denial of that Motion, Petitioner filed an appeal to the United States Court of Appeals for the Eighth Circuit. Petitioner raised several issues in his first Statement of Issues on Appeal. He stipulated that no portions of the transcript would be included in the record. In response to Petitioner's Statement of Issues on Appeal, the Respondent requested several portions of the transcript be included in the record. Petitioner thereafter filed an amended designation which states:

> "Comes now Appellant and amends in full his prior designation filed with the Court:
>
> 1. That no part of the transcript is to be included in the record of appeal and that the record of appeal is to consist solely of a certified copy of the docket entries in this matter subject to the right of any party to request the United States Court of Appeals for the Eighth Circuit that designated parts of the record be transmitted.
>
> Appellant further states that the issues he intends to present on appeal are as follows:
>
> 1. Whether the court properly entered summary judgment in favor of defendant, Donald Sweeney, that his arrest of plaintiff on July 5, 1974, was made with probable cause.
> 2. Whether the court properly ruled that the plaintiff's complaint did not state a cause of action against defendant, the Village of Breckenridge Hills, upon the grounds of sovereign immunity." (Mailed by Mr. Richard Geissal April 5, 1977).

The Court of Appeals then considered the Appeal, affirmed the dismissal of Breckenridge Hills, and reversed the District Court's Order of Summary Judgment on the issue of false arrest and remanded the case back to the District Court.

Judge Meredith limited the retrial to the issue of whether or not Respondent had probable cause to arrest Petitioner. The jury returned a verdict for Respondent on the issue of unlawful arrest and Judgment was entered against Petitioner. Petitioner's Motion for a New Trial was denied, and a second appeal taken. The sole issue raised on the second appeal was whether the District Court properly followed the mandate issued by the Court of Appeals. On May 30, 1979, the Court of Appeals affirmed the judgment of the District Court. On June 18, 1979, the Court of Appeals denied Petitioner's Petition for Rehearing in Banc.

ISSUE

1. Whether the mandate of the United States Court of Appeals for the Eighth Circuit remanding this case for new trial required a new trial on all theories of liability originally advanced by Plaintiff-Petitioner, or, whether the Court of Appeals Opinion was limited to those issues raised and preserved on appeal by Petitioner.

ARGUMENT

I

A careful reading of the Petition for a Writ of Certiorari in this case reveals only one real issue presented for this Court's consideration—whether the District Court on remand followed the mandate of the Eighth Circuit Court of Appeals. Rule 19, Supreme Court Rules, can be fairly summarized as requiring Petitioner to raise some substantial issue of law; either a conflict between courts on a question of law, or a decision of first impression by a lower court on an important issue of federal law. In essence, Petitioner complains only of the Court of Appeals' failure to enforce Petitioner's interpretation of the court's own mandate. Presumably the Court would not have affirmed the District Court on appeal had they agreed with Petitioner.

In order to determine exactly what the Court of Appeals wished presented to a jury on remand it is necessary to consider which issues were preserved by Petitioner on appeal. Petitioner's initial intent apparently was to raise numerous issues on appeal. However, following Respondent's designation of portions of the transcript he wished to place before the Court of Appeals, Petitioner amended his designation and abandoned all issues except whether the court properly entered Summary Judgment on the allegations of false arrest. The only issues discussed by the Court of Appeals were those briefed by Petitioner. The failure of Petitioner to set out additional points on appeal constitutes an abandonment of those issues. ***Pet Milk Co. v. Boland,*** 185 F. 2d 298 (8th Cir. 1950). The relief sought by Petitioner makes no mention of a retrial on the issue of the illegality of the search and seizure of his documents. This conclusion states:

> "Clearly there is a material issue of fact as to whether appellee, Donald Sweeney, did have probable cause for the arrest of appellant and, therefore, the ruling of the trial court should be reversed and the cause of action for wrongful arrest should be presented to a jury. Further, since a cause of action has been stated against appellee, the Village of Breckenridge Hills, the ruling of the trial court should be reversed and remanded."

Petitioner cannot abandon an issue on appeal, fail to brief the issue, and, indeed, completely ignore the issue on appeal, and then complain when the order of the appellate court fails to address that issue. Rule 28(a)(5), Rules of Appellate Procedure, provides the conclusion of Appellant's Brief shall be: "A short conclusion stating the precise relief sought." The relief sought by Petitioner was considered, and the Court of Appeals' decision and Order must be read in light of the request for relief presented.

Petitioner's argument that the trial court must follow the Appellate Court's mandate, while correct, avoids the issue. The Appellate Court did not direct the District Court to retry both the issue of unlawful arrest and the issue of illegal search and seizure. Petitioner's numerous citations supporting his position do not meet the issue. While it is true that the trial court is bound by the mandate of the Appellate Court, the Appellate Court has the option of ordering retrial of less than all the issues originally litigated. Rule 59 (a) Federal Rules of Civil Procedure, provides for new trial as to "all or any of the parties on all or part of the issues." See also ***Gasoline Products Co., Inc. v. Champlin Refining Co.,*** 283 U. S. 494, 51 S. Ct. 513, 75 L. Ed. 1188 (1933).

The entire thrust of Petitioner's argument is that the Eighth Circuit Court of Appeals' mandate was not followed. The best authority on this issue is the Court of Appeals itself. Petitioner raised this issue on a second appeal, and the very court which issued the mandate affirmed the District Court. Petitioner sets

out only a part of the concluding paragraph of their decision. The paragraph in its entirety states:

> "It is clear that all possibilities for recovery have now been logically foreclosed by the two jury verdicts. The latest jury trial resulted in a finding that the arrest was lawful. The earlier jury trial resulted in a finding that the arrest was lawful. The earlier jury trial resulted in a finding that Nix was not entitled to recover after the District Court had ruled that the arrest was lawful. There is no factual issue remaining for decision. While the plaintiff is entitled to have his case decided by a jury, the defendant is also entitled to a conclusion of this litigation." (A-12)

Thus the very court issuing the mandate determined the District Court acted properly.

Respondent suggests to this court that the Writ of Certiorari should also be denied because Petitioner has had a jury trial on both the issue of the legality of his arrest and the legality of the search of his offices and the seizure of Petitioner's papers. Petitioner alleges he was injured because the court refused to "allow any evidence as to the illegal search and seizure to be presented to the jury so that the jury could find the respondent liable of an illegal search and seizure due to the unlawful arrest."

There was no illegal search and seizure. This issue was tried before a jury in Petitioner's first trial and a verdict for respondent returned. It is conceded that an otherwise proper search and seizure incident to an unlawful arrest is deemed a violation of rights guaranteed under the Constitution of the United States. The second trial was conducted on the issue of the legality of the arrest and the jury again upheld respondent. There was no illegal arrest. There was no unlawful search and seizure independent of the arrest, and, because the jury found

respondent had probable cause to arrest petitioner, there is no possibility that a jury could find, as petitioner implies, that the search and seizure was unlawful because it was conducted following an illegal arrest. The Court of Appeals in its second opinion notes that: "There is no factual issue remaining for decision." (A-12)

In conclusion, the only possible harm to Petitioner arising out of this litigation was the necessity of litigating the issues in two separate trials. As discussed above, due to the relationship between the arrest and the seizure of the documents, there was no harm done to Petitioner by requiring him to try his case before two juries.

CONCLUSION

For the reasons stated, Respondents respectfully request this Court refuse to issue a Writ of Certiorari.

Respectfully submitted,

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